First Western Building Services, Inc. *and* Taras Busch. Case 32–CA–12167

November 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 24, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a limited exception and letter in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, First Western Building Services, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
*Phil B. Hammond, Esq. (fiMDBUfl*ERR17*fiMDNMflHammond & Tellier)fiM*
spondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I conducted a hearing on February 20–21, 1992, is based upon an unfair labor practice charge filed by Taras Busch (fiMDBUfl*ERR17*fiMDNMflBusch)fiMDBUfl*ERR17*fiMDN complaint issued on December 19, 1991, on behalf of the General Counsel of the National Labor Relations Board (fiMDBUfl*ERR17*fiMDNMflBoard)fiMDBUfl*ERR17*fiMDNMfl, by the Reg alleging that First Western Building Services, Inc. (fiMDBUfl*ERR17*fiMDNM ent)fiMDBUfl*ERR17*fiMDNMfl, has engaged in unfair labor practices within ing of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl tions Act (fiMDBUfl*ERR17*fiMDNMflAct)fiMDBUfl*ERR17*fiMDNMfl.

The complaint alleges, in substance, that in or about late May 1991 Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiM when its superintendent Daniel McReaken instructed Respondent's employee, Busch, to cease engaging in union activity, and violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17 about July 11, 1991, when it discharged Busch because of his union or other protected concerted activity. Respondent filed an answer denying the commission of the alleged unfair labor practices.[1]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs submitted by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. The setting

Respondent is a corporation with its office and place of business in San Leandro, California. Its business is divided into two divisions; a roofing and a waterproofing division. The waterproofing division is involved in this case.

Respondent's waterproofing division operates from an office and yard in San Leandro, California. During the time material, it employed workers on as many as 20 and as few as 5 jobs at one time. Its employees are classified as foremen, journeymen or apprentices.

Respondent's supervisory hierarchy, for the waterproofing division, is as follows. David St. Lawrence is the manager of the division and is responsible for all of its operations. Immediately below him in the chain of command is Harry

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (fiMDBUfl*ERR17*fiMDNMfl1950)fiMDBUfl*ERR17*fiMDNMfl, enfd. 188 F.2d 362 (fiMDBUfl*ERR17*fiMDNMfl3d Cir. 1951)fiMDBUfl*ERR17*fiMDNMfl. We have carefully examined the record and find no basis for reversing the findings.

The Respondent has alleged that the judge was biased against it and, as a result, the Respondent was denied due process. We have carefully examined the entire record, including the judge's decision, and are convinced that the judge's conduct does not constitute legal prejudice or even the appearance of partisanship. Although the judge actively participated in the questioning, much of that participation was necessary to clarify the record. A judge can interrupt or question witnesses in order to clarify testimony. *NLRB v. Overseas Motors*, 818 F.2d 517, 520 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1987)fiMDBUfl*ERR17*fiMDNMfl. Indeed, it is the duty of the judge to inquire fully into the facts. A judge has the authority to call, examine, and cross-examine witnesses. See Sec. 102.35 of the Board's Rules. Because we find no evidence that the judge was biased or prejudiced, we deny the Respondent's request for a hearing de novo before another administrative law judge.

The General Counsel filed a limited exception to the judge's finding in sec. I,b,1, par. 8, of his decision, that Respondent's manager, David St. Lawrence, testified that he told employees at staff meetings that foremen had the authority ''to terminate employees who did not do their work correctly.'' Our review of the record shows that St. Lawrence did not testify that he made this statement. Rather, St. Lawrence's discredited testimony was limited to statements that he made at employee meetings regarding a foreman's ability to shut the job down when wind conditions were unsafe and to send employees home who could not perform their jobs because of a drug problem. The judge also found in sec. I,b,2, par. 6, of his decision that when employees are requested to use their personal vehicles to travel to and from jobs, they must be paid ''35 cents per hour,'' when in fact they must be paid 35 cents per mile. These inadvertent errors do not affect the outcome of the case.

[1] In its answer to the complaint, Respondent admits it is an employer engaged in commerce within the meaning of Sec. 2(fiMDBUfl*ERR17*fiMDNM (fiMDBUfl*ERR17*fiMDNMfl7)fiMDBUfl*ERR17*fiMDNMfl of the Act and meets the dictional standard, and also admits that the labor organization involved in this case, Roofers, Waterproofers and Allied Workers Union, Local 81, AFL–CIO (fiMDBUfl*ERR17*fiMDNMflUnion)fiMDBUfl*ERR17*fiM the meaning of Sec. 2(fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl of th

Conley, the general superintendent, and immediately below Conley is Daniel McReaken, the superintendent of the waterproofing division. McReaken assumed that position during the first part of May 1991, having replaced Casey Walters, who at that the asked to be relieved from the position of superintendent. Walters remains in Respondent's employ as both a foreman and a journeyman. Also employed by Respondent during part of the time material herein, was Mark Barnes, who had the title of project manager. It was Barnes, who, as project manager, was responsible for Respondent's proposal for the waterproofing job performed by Respondent in San Francisco, California at 120 Montgomery Street. Barnes, with Walters and then McReaken, supervised the work on that job until Respondent terminated Barnes on July 12, 1991, at which time his responsibilities were assumed by St. Lawrence.

Busch, the alleged discriminatee, is a journeyman waterproofer. He was hired by Respondent on August 1, 1990, and from that date until sometime in October 1990 worked for Respondent as foreman on a job in Stockton, California. After the completion of that job, Busch worked for Respondent as a journeyman for a few days on other jobs. Then, in October 1990, he was assigned as foreman to Respondent's job at 120 Montgomery Street in San Francisco, California, herein sometimes called the 120 Montgomery Street job.

The building which Respondent waterproofed at 120 Montgomery Street is a commercial building, 25 stories high. Under its contract with the owner, Respondent was obligated to cut out all of the old caulking and grout joints on the sides of the building and recaulk the sides of the building. During the time material, Respondent assigned from two to four workers to this job, including Busch. On 1 or 2 days there were six workers on the job, but normally there would be four, including Busch. Their hours were from 7 a.m. to 3:30 p.m., with a half-hour off for lunch.

The workers employed by Respondent on the 120 Montgomery Street job did their work by standing on scaffolds, referred to herein as rigs. The rigs, two of them, were approximately 40 feet wide and suspended from the top of the building by cables.

The production technique and materials used on the job were prescribed by the project manager, by the materials' representatives and by the owner's inspectors. Their orders were given to Busch, who relayed them to the other workers.

The Union represents all of Respondent's employees who perform waterproofing-related work, including the employees classified as foremen, as well as those classified as journeymen and apprentices. During the time material all of the employees (fiMDBUfl*ERR17*fiMDNMflforemen, journeymen and apprentices) were covered by a collective-bargaining agreement between the Union and an Employer's association. Respondent was bound to abide by the terms of this agreement (fiMDBUfl*ERR17*fiMDNMflthe agreement)fiMDBUfl*ERR17*fiMDNMfl by virtue of having authorized the association to represent it or by virtue of having independently agreed to become a party to the agreement. The agreement contains the following provisions which are relevant to an understanding of this case.

Article XII of the agreement, entitled ''Travel,'' reads in pertinent part:

> Section 1. Employees shall report to the Individual Employer's shop at 8 a.m. Employees shall not be required by the Individual Employer to report directly to the job-site. However, by mutual agreement between the Employer and his employees, employees may report directly to the job site. Employees who elect to report directly to a job site within the free zone will not be paid for their travel or driving time or their travel expenses. . . .
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> Section 2. (fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNM the actual time spent driving trucks from the Individual Employer's shop to the first job site . . . and for the actual time spent driving trucks from the last job site to the shop . . . at two-thirds (fiMDBUfl*ERR17*fiMDNMfl2/3)fiMDBU straight time rates of wages only . . . (fiMDBUfl*ERR17*fiMDNMfld ployee may drive a truck with preference being given to foremen and journeymen who have a valid California driver's license and who are acceptable to the Employer's Insurance Company. . . .
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> Section 3. Employees shall be reimbursed for their costs and expenses of travel as follows: (fiMDBUfl*ERR17*fiMDNMfla) free zone of fifteen (fiMDBUfl*ERR17*fiMDNMfl15)fiMDBUfl*ERR17*f ual Employer's shop. (fiMDBUfl*ERR17*fiMDNMfli)fiMDBUfl*ERR17* pensated for the time spent traveling within the free zone radius from the Individual Employer's shop to the initial job site for the day . . . and for the time spent traveling from the last job site each day to the shop. . . . (fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl the Individual Employer shall reimburse the employee $34 per day. (fiMDBUfl*ERR17*fiMDNMflc)fiMDBUfl*ERR17*fiMDNM option, instead of reimbursing the employee for travel expenses as provided in subparagraph (fiMDBUfl*ERR17*fiMDNMflb)fiM dividual Employer may compensate the employee for time spent in traveling beyond the free zone radius border to the initial job site for the day . . . and from the last job site . . . to the Individual Employer's free zone radius border at two-thirds (fiMDBUfl*ERR17*fiMDNMfl2/3)fiMDBUfl*E plicable straight time rate of wages only . . . . Such travel expense beyond the free zone radius is compensable up to a maximum of thirty-four dollars (fiMDBUfl*ERR17*fiMDN day. . . . (fiMDBUfl*ERR17*fiMDNMflf)fiMDBUfl*ERR17*fiMDNMfl age from the Individual Employer's shop when transportation is not furnished by the Employer and employees are requested to use their own cars as provided in Section 6 of this article.
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> Section 6. Use of Employee's Car. When transportation is not furnished by the Individual Employer and employees are requested to use their own cars when traveling from shop to job, or job to job, or job to shop, they shall receive 35 cents per mile.

Article XVII titled ''General Rules,'' at section 14, provides:

> [e]mployees shall not be required as a condition of employment to furnish the use of an automobile or other conveyance to transport tools, equipment or materials from shop to job, from job to job, or from job to shop, facilities for such transportation to be provided by the Individual Employer. This provision is not to restrict the use of an automobile for other conveyance to transport its owner and personal tools from home to shop or job at starting time, or from shop or job to home at quitting time.

The plain language of article XII, section 1, of the agreement, as set forth above, provides that Respondent's employees are to report each day for work at Respondent's San Leandro facility and that Respondent may not require them to report directly to a jobsite if they chose not to agree to do so. Also, the plain language of section 2 of article XII, provides that an employee who drives a vehicle from Respondent's San Leandro facility to his jobsite, at the start of the workday, and back to the shop from the jobsite, at the end of the workday, must be compensated for the actual time spent driving the vehicle during those periods. The record reveals that Respondent and the Union have interpreted this provision as meaning that the compensation of the vehicle's driver is based upon his straight time hourly rate of pay for the period of time it takes him to drive the vehicle to and from the jobsite, herein referred to as ''drive time.''

It is Respondent's policy to have its job foreman drive the other employees to and from Respondent's San Leandro facility to the various jobs. The foremen, as required by the collective-bargaining agreement, are given ''drive time'' pay for doing this. Respondent's general superintendent, Conley, testified it is ''standard procedure'' for Respondent to require the employees employed on its several jobs to report each morning to Respondent's San Leandro facility, so that the foremen could pick up needed equipment and turn in their timesheets and talk to management about what was going on at the jobs, and, so management could make sure all of the employees reported for work on time. Conley also testified that after they report to the San Leandro facility, the employees are then transported by their foreman in a company van to the job and at the end of the workday the foreman drives them back to Respondent's facility in the van, for which driving time the foreman is paid ''drive time'' pay.

Regarding the so-called 15-mile ''free zone,'' referred to in article XII of the agreement, the Union and Respondent concluded that the 120 Montgomery Street job was within the free zone, inasmuch as the free zone, being a radius, is measured by air miles, not by actual driving distance, and when this is done on a map it is clear that the 120 Montgomery Street job was within the free zone. It is also undisputed, based upon Busch's undenied testimony, that the actual driving mileage from Respondent's San Leandro facility to the 120 Montgomery Street job exceeds 15 miles.

2. The events leading up to and surrounding Busch's discharge

Busch began work for Respondent on August 1, 1990. He was hired as a ''journeymen foreman.'' He was told by General Superintendent Conley, when he was hired, that Respondent provided company vans for its foremen to drive from the Company's San Leandro facility to the job and from the job back to the Company's facility, and that Respondent paid its foremen 1 hour's ''drive time'' for driving the van to and from the job, which equaled $24.30, a foreman's hourly rate of pay.

Busch, who, started work for Respondent on a job in Stockton, California, for the first 2 days on the job was assigned a company van which he drove to and from the job. On the third day, when he arrived in the morning at the company yard, he was informed by Superintendents Walters and Conley that Respondent was short of vans and Busch's van was needed on another job. As a result, Busch used his own motor vehicle to transport himself to and from the Stockton job on that day and for the next several days.

The following week Busch asked Conley to assign him a company van to use to get to and from the Stockton job. Conley told him the van which he had been using was still being used on another job, but it would be returned to Busch in a couple of days. Subsequently, approximately 1 week later, Busch was given the use of a van for 1 or 2 days, and then it was taken away from him again. Thereafter, for the remainder of the Stockton job, Busch used his own motor vehicle to transport himself to and from the job.

In September 1990, when the manager of the waterproofing division, St. Lawrence, visited the Stockton job and introduced himself to Busch, Busch complained he had not been given a van for transportation. St. Lawrence stated he knew nothing about the matter, but would discuss it with Superintendents Walters and Conley and get back to Busch. It is undisputed at this time all of the other foremen employed by Respondent had been assigned vans to drive to and from their jobs.

In October 1990, when Busch was assigned as foreman to the 120 Montgomery Street job and was not provided with a van, he drove his own automobile to and from the job. He parked it in a public parking lot and was reimbursed by Respondent for his parking fees for the first several months. However, in approximately March 1991 Respondent advised him it would no longer reimburse him for his parking fees, so Busch at that time began to take public transportation, the Bay Area Rapid Transit subway (fiMDBUfl*ERR17*fiMDNMflBART)fiMDBU in Oakland, California, to downtown San Francisco, where the job was located. He normally used BART to get to and from work, from approximately March 1991 until his termination in July 1991.

During the period he worked on the 120 Montgomery Street job Busch received ''drive time'' pay between one and two or three times weekly, under the following circumstances. Whenever he used his own motor vehicle to drive to the Company's yard on business, i.e., to pick up the employees' paychecks or to pick up materials, he requested, on the daily timesheets he submitted to the Company's office, pay for his ''drive time'' for those occasions, and his requests were granted. In addition, every so often, Superintendent Walters authorized Busch to submit requests on the timesheets for an extra day or two of ''drive time'' pay. These requests were also granted.

In October 1990 Busch spoke to Union Business Manager Ronald Boyer about the 120 Montgomery Street job. He told Boyer things were fine on the job, except he had not been provided with a van for transportation and was not being reimbursed for travel or being paid per diem. Boyer told him he was entitled to a van and to travel reimbursement, but not per diem. Boyer warned Busch that if Busch grieved to the Union about the matter and the Union raised the issue with Respondent, on Busch's behalf, Busch would most likely be fired. Boyer suggested Busch resolve the matter himself by speaking to Respondent's management. Regarding Busch's claim for per diem, after checking the map on the wall of the Union's office, Boyer told Busch that the 120 Montgomery Street job was within the 15-mile free zone and not, as Busch contended, outside of the free zone, and told Busch that in view of this Busch was not entitled to the $34 a day per diem set by the collective-bargaining agreement.

Early in December 1990, when Busch went to the Union's office to pick up his check for vacation pay, he spoke to Boyer and to Douglas Ziegler, the Union's financial secretary-treasurer. He told them he had still not been provided with a van. Boyer and Ziegler told him they could talk to the Respondent about the issue, but warned if they did, Busch would most likely be fired. They advised him to try and work things out with Respondent's management.[2]

Late in 1990, Busch went to St. Lawrence's office and complained he had not been provided with a company van or ''travel pay.'' St. Lawrence responded by asking, ''why are you making a big deal out of this little issue.'' Busch answered that St. Lawrence might consider it a little issue, but it was a big one for Busch because he was the only foreman that Respondent was not providing with transportation to the job. St. Lawrence stated he would talk with Busch's superiors and get back to Busch.

St. Lawrence did not get back to Busch as promised, so, in January 1991, during a meeting attended by Respondent's waterproofing division employees and management at the Company's San Leandro facility, Busch again complained to St. Lawrence about Respondent's failure to provide him with a van. Present at this meeting, besides Respondent's foremen, journeymen and apprentices, were St. Lawrence and Superintendents Conley and Walters. During the meeting Busch complained to St. Lawrence that Respondent still had not provided him with a van or transportation to the 120 Montgomery Street job and stated he would like a van or reimbursement for his travel, which he explained to St. Lawrence meant $34 a day per diem or a van and 1 hour of ''drive time'' pay. St. Lawrence stated he would talk it over with Conley and Walters.

Subsequently, in March 1991, during another meeting attended by Respondent's employees and management at St. Lawrence's office in San Leandro, Busch again complained to St. Lawrence about Respondent's failure to provide him with a van. Present at this meeting, besides Respondent's foremen, journeymen, and apprentices, were St. Lawrence, Conley and Walters. During the meeting Busch told St. Lawrence he was still working at the 120 Montgomery Street job and had been employed on that job for a long time and felt he deserved ''travel pay'' or a van. St. Lawrence answered by saying something to Conley, who told Busch, ''this is a give and go situation. You have to give a little bit to the company.'' St. Lawrence then pointed out to Busch that Respondent compensated a foreman at the foreman's premium hourly rate of pay even when a foreman was not ''running a job,'' and stated to Busch, ''so since we're giving a little bit to you guys so you guys should give a little bit to us.'' Busch indicated he did not agree. St. Lawrence stated he would talk it over and get back to Busch.

St. Lawrence never got back to Busch, so, late in May 1991 or the first part of June 1991, while in St. Lawrence's office, in the presence of Superintendent McReaken,[3] while talking about the progress of the 120 Montgomery Street job, Busch against brought up the subject of Respondent's failure to provide him with transportation to and from the job or travel reimbursement. He told St. Lawrence that his previous demands on this subject were no longer negotiable and stated he felt he should be receiving everything he was entitled to according to the ''Union contract.'' St. Lawrence replied he would talk to Conley about the matter and get back to Busch.[4]

The next day McReaken went to the 120 Montgomery Street job and asked Busch, who was on a scaffold working with Casey Walters, to come down because he wanted to speak to him.[5] McReaken told Busch he had spoken to General Superintendent Conley about Busch's demand for a company van or travel pay and Conley had told McReaken to inform Busch that Busch was not going to receive a van and for Busch ''to leave the issue alone.'' McReaken also told Busch that Conley had said Busch had two choices; he could step down as foreman and be assigned to work on another job under another foreman, or, if he remained at the 120 Montgomery Street job, ''they would be watching [him] and if [he] was late three times that they would give [him] three written warnings and then fire [him].'' Busch answered by stating he understood McReaken had to do his job, but he intended to remain at 120 Montgomery Street and continue to work the best way he could.

During the same time period, McReaken remarked to Project Manager Barnes that Busch, ''is still whining about . . . travel pay,'' and told Barnes that while former Superintendent Walters could not handle Busch's complaints, McReaken knew how ''to fix him,'' and explained to Barnes that if Busch was late three more times McReaken would fire him and that would be ''the end of it [referring to Busch's demand for travel pay].''

The aforesaid descriptions of McReaken's conversations with Busch and Barnes are based upon the testimony of Busch and Barnes. McReaken denied making the remarks at-

[2] The above-described October conversation between Busch and Boyer and the above-described December conversation between Busch, Boyer, and Ziegler, are based on the testimony of Busch, whose testimonial demeanor was good. Boyer, a witness for Respondent, was asked if he ever told Busch that he would be fired if he filed a grievance, or the Union grieved on his behalf? Boyer testified, ''I may have said something similar to that . . . what I think I would have said . . . is that life could be very uncomfortable . . . in this particular shop if you make a big issue of something that isn't valid . . . and not knowing whether or not there was any validity to his grievance at that time, I may have said something like that.'' Ziegler, a witness for Respondent, admitted that prior to Busch's termination that Busch spoke to him about travel time, but testified he was unable to recall what was said.

[3] As found supra, McReaken replaced Walters as waterproofing superintendent in early May 1991.

[4] The above descriptions of Busch's conversations with St. Lawrence about Respondent's failure to provide him with a van and/or travel pay, which occurred in September 1990, the end of 1990, January 1991, March 1991, and late May or early June 1991, are based upon Busch's testimony. Not only was his testimonial demeanor good when he testified, but St. Lawrence, who testified for Respondent, did not deny or otherwise contradict Busch's testimony about these conversations. It is also significant that McReaken, a witness for Respondent, was not questioned about the late May or early June 1991 conversation and did not deny it occurred. Nor were Walters or Conley, who also testified for Respondent, questioned about the above-described January 1991 and March 1991 conversations and did not deny they occurred.

[5] As noted supra, Casey Walters voluntarily resigned his position as superintendent early in May 1991 and was replaced by McReaken, but remained in Respondent's employ working sometimes as a foreman and at other times, as in this case, as a journeyman.

tributed to him by Barnes and gave a completely different account of his jobsite conversation with Busch. He testified he told Busch he had spoken to Conley about Busch's complaints about drive time pay and Conley had stated Busch was to use a company van, that there was a van at the Company's San Leandro yard for Busch to use to drive to and from the jobsite, and that if the job was too much for Busch, McReaken would assign him to another job as a journeyman and let someone else run the 120 Montgomery Street job, and that Busch replied by stating his pickup truck was not working, so he was unable to come to the San Leandro yard for the company van and would do so later on down the road.

I reject McReaken's testimony and credit the above testimony of Busch and Barnes. I considered that Busch is an interested party and that Barnes, having been fired by Respondent, is presumably biased against it. Nonetheless, I credited their testimony and rejected McReaken's because their testimonial demeanor—their tone of voice and the way they looked and acted while testifying—was good, whereas McReaken's testimonial demeanor was poor. In addition, Busch's account of what was said to him by McReaken is corroborated by the fact that immediately after the conversation, when Busch returned to work with former Superintendent Casey Walters, Busch informed Walters about the message from Conley that McReaken had relayed to him. Busch told Walters McReaken had stated Conley had given Busch the choice of leaving the 120 Montgomery Street job or remaining there and being issued written warnings the next three times he was late for work and then being fired. Walters informed Busch that Conley disliked him and that Conley's reason for disliking him was because he was black and because he was a ''whiner'' who was persistent about his ''union rights.''[6] In my opinion the fact that immediately after his conversation with McReaken, Busch informed a third party—former Superintendent Walters—about the message from Conley that McReaken had relayed to him, bolsters the credibility of Busch's account of his conversation with McReaken.[7]

As I have found supra, from September 1990 through late May 1991 or early June 1991, on five different occasions Busch complained to Respondent's manager, St. Lawrence, that he was not being provided with a company van for transportation from Respondent's facility to his job and back, and St. Lawrence indicated to him, among other things, he would speak about the matter to Busch's immediate superiors and get back to Busch. As I have also found supra, St. Lawrence never got back to Busch, but late in May or early in June, the day after making his last complaint to St. Lawrence on this subject, Superintendent McReaken relayed to Busch a message from General Superintendent Conley that Busch was not going to receive a company van and should leave the issue alone.

In making the above findings, I considered Conley's following testimony: Superintendent Walters told him Busch was requesting to be paid 35 cents a mile for the miles he traveled between his home and the job; Conley told Walters that Respondent could not agree to that request; Busch was not satisfied with that answer and ''so it went on, and on and on''; one day when Walters informed Conley that Busch was still asking for travel time of 35 cents per mile, Conley again instructed Walters to talk to Busch and tell him Respondent would not agree to this demand; Walters subsequently told Conley he could not get anywhere with Busch; and, because of this, Conley agreed to meet with Busch to discuss the matter. I also considered the testimony of Conley and Walters that on February 26, 1991, Walters and Conley met with Busch in Respondent's office and that Conley told Busch there was a company van available for him to use, but Busch stated he preferred to take BART to work rather than come to the Respondent's facility for a company van. I reject Conley's and Walters' aforesaid testimony and for the reasons below credit Busch's testimony that Conley never told him there was a van available for him to use.

The testimonial demeanor of Conley and Walters—their tone of voice and the way they looked and acted while testifying—was poor, whereas the testimonial demeanor of Busch was good.

Conley's and Walters' testimony conflicts on a matter of substance. As described supra, Conley testified that on several occasions Walters told him Busch was demanding that Respondent pay him 35 cents a mile for traveling to and from the job from his home. However, Walters testified this was not what Busch was demanding. According to Walters' testimony, Busch's demand, as expressed to Walters, was that ''he felt he was entitled to drive time,'' that ''he wanted to be paid an extra hour a day, in addition to his time on the job. He wanted another hour per day as compensation for transportation to and from the job,'' which Walters testified would amount to $24.30 a day (fiMDBUfl*ERR17*fiMDNMflTr. 262–263)fiMD

Also significant in rejecting Walters' and Conley's account of what occurred at the alleged February 26, 1991 meeting is the fact that Conley's description of the meeting is incredible.[8] Conley's account of what transpired is as follows: Busch stated Respondent was obligated to pay him 35 cents per mile for the miles he traveled between his house and the 120 Montgomery Street job; Conley indicated his disagreement; Conley told Busch that before going to their respective jobs all of Respondent's foremen come to the Company's San Leandro facility for these purposes—to turn in their timesheets, to talk with management about what is happening on their jobs, to pick up equipment, and to take one of the Company's vans to drive to the jobsite; Conley stated this was the way he wanted Busch to operate; Conley also explained to Busch that the only means Respondent had of knowing whether a foreman and his crew were showing up for work or not was to have them come to Respondent's facility each morning before going to the job; Conley told Busch ''everyone comes in here. How can we control your

[6] The above description of Busch's conversation with Walters is based on Busch's undenied testimony. Walters, a witness for Respondent, did not deny it occurred.

[7] I note that Busch also testified that at the end of the workday, the day of his jobsite conversation with McReaken, he telephoned Union Business Manager Boyer and told him what had been said to him by McReaken, specifically about the two choices that had been given to him, and was advised by Boyer to keep his paystubs and to begin keeping daily reports of what occurred on the job, so when he was fired by Respondent he would be in a position to file a grievance. Boyer, a witness for Respondent, did not deny Busch's testimony.

[8] Conley testified in detail about what was stated at the meeting, whereas Walters was only able to give a sketchy account.

crew if you're showing up over there and they don't know what the hell's going on'' (fiMDBUfl*ERR17*fiMDNMflTr. 247–248) fiMDBUfl*ERR17*fiMDNMfl Busch answered it was easier for him to take BART to the job; Conley replied that while it might be more convenient for Busch and the other workers on his crew to take BART to the job, it was not easier for the Respondent because he stated if the employees went directly to the job without coming to Respondent's facility, ''we have no control over what's going on . . . we would not know if anybody showed up or not''; Conley instructed Busch to come to Respondent's facility each morning to get a van; Busch asked, ''what if I ride BART''; Conley answered, ''that's your own choice then. *But I'm telling you to come get the truck*.''

It is undisputed that following the alleged February 26, 1991 meeting Busch continued to take BART to work rather than obey Conley's directive to ''come get the truck.'' This, despite the fact Conley wanted Busch to come to Respondent's facility each morning because, as Conley testified, it was ''standard procedure'' for all of Respondent's foremen to come to the Respondent's facility each morning for several business reasons and to drive one of the Company's vans to the jobsite (fiMDBUfl*ERR17*fiMDNMflTr. 243, L. 25, and 244, L. 15) fiMDBUfl*ERR17*fiMDNMfl. It is also undisputed that Conley knew Busch continued to take BART to and from work and was refusing to obey Conley's instruction that he conform to company policy by reporting to the Company's facility each morning and drive a company van to the job. Yet, Conley did not discipline Busch for this act of insubordination or even speak to him again about the matter.

In other words, Respondent would have me believe that on February 26, 1991, Conley expressly ordered Busch to cease using BART to get to his job, but instead to report first each morning to Respondent's San Leandro facility before going to the job, and he would be given a van to drive from the facility to the job. Respondent would also have me believe that Busch disobeyed this expressed order, yet was not disciplined nor even spoken to about his act of insubordination. This despite the fact that it was Respondent's standard policy, followed by all but Busch, to have foremen report first to the San Leandro facility before reporting to their jobs and to drive to their jobs in the Company's vans. Respondent offered no reason why Busch was not disciplined nor even spoken to for engaging in this blatant act of insubordination. I am of the opinion that the reason for this is that Busch was not insubordinate; that on February 26 he was not told there was a company van available for him to use as transportation to and from the job and was not directed to report each morning to Respondent's facility rather than to go directly to his job via BART. I am persuaded that Conley's and Walters' description of what allegedly occurred on February 26, 1990, when viewed in context, demonstrates its implausibility and indicates it was fabricated to suit Respondent's case. The implausibility of their account of this meeting is further demonstrated by the undisputed fact that, as I have found supra, even after the February 26 meeting Superintendent Walters continued to pay ''drive time'' computed at $24.30 an hour to Busch on those occasions Busch used his personal motor vehicle to drive to the Company's facility on business and even authorized an extra day or two of ''drive time'' pay for Busch on days he took BART to and from work. I find it difficult to believe that Walters would have done this if, as he testified, he was present when Conley told Busch that it was company policy that he come to the shop each morning and pick up a Company van and that Busch refused to do this, but instead continued to go directly to the job via BART.

McReaken testified that on July 1, 1991, he arrived at the 120 Montgomery Street job prior to the 7 a.m. starting time and waited outside to see what time the crew got to work. He also testified that when Busch arrived at the job 10 minutes late, McReaken told him he was responsible for getting the job started on time and because he was running the job should set a good example for the rest of the employees. McReaken also testified that on July 1 he instructed Busch to change certain production techniques being currently used on the job.

Busch testified McReaken did not speak to him about his tardiness on July 1, or about a change in production technique. Busch testified that the first time anyone from the Company, including McReaken, spoke to him about those subjects was on July 3, as described infra.

I reject McReaken's testimony that on July 1, as described above, he criticized Busch for coming to work late that day and told him to change certain production techniques. In part I reject his testimony because his testimonial demeanor was poor, whereas Busch's was good. I also note that in a July 10, 1991 memorandum submitted by McReaken to St. Lawrence dealing with McReaken's conversations with Busch on July 1, 3, and 10, there is no mention that on July 1 McReaken instructed Busch to change the production technique being used on the job. Instead the memorandum indicates it was not until July 3 that Respondent for the first time instructed Busch to change the production technique being used on the job.[9]

On July 3, 1991, Superintendent McReaken waited outside the 120 Montgomery Street job prior to the employees' 7 a.m. starting time to observe when Busch came to work. Busch arrived at either 7:03 a.m. (fiMDBUfl*ERR17*fiMDNMflaccording to 7:10 a.m. (fiMDBUfl*ERR17*fiMDNMflaccording to McReaken)fiMDBUfl*ER following occurred when Busch and McReaken met in front of the jobsite: McReaken criticized Busch for being late for work and they argued about that; McReaken stated he wanted Busch to be on the job at 6:45 a.m.; when Busch asked if Respondent intended to pay him for coming to work at 6:45 a.m., McReaken answered ''no''; Busch stated if Respondent did not intend to pay him for coming to work prior to 7 a.m., which was the employees' starting time, he would be there at 7 a.m.; McReaken accused Busch of not caring about his job; Busch denied this accusation; and they then entered the building and went up to the third floor, where the work rig was tied.

On the third floor waiting for them to arrive were: Manager St. Lawrence; Project Manager Doug Sinai, employed

[9] I considered St. Lawrence's testimony that in early or mid-June 1991, ''several weeks'' prior to July 3, he directed McReaken to instruct Busch to change certain production techniques being used on the 120 Montgomery Street job. McReaken did not testify, however, that when he instructed Busch on July 1 to change certain production techniques, he was following St. Lawrence's instruction, nor did he corroborate St. Lawrence's testimony. Nor has Respondent explained why, if, in early or mid-June, ''several weeks'' prior to July 1, St. Lawrence directed McReaken to instruct Busch to change certain production techniques, McReaken did not get around to doing this until July 1.

by Respondent; and Joe French, a materials representative employed by one of Respondent's suppliers.

It is undisputed that after McReaken and Busch got to the third floor that two topics were discussed: Busch's tardiness; and the manner in which the work on the job was being performed. Busch, St. Lawrence and McReaken testified about what occurred during the July 3 meeting. The pertinent parts of their testimony concerning that meeting are summarized immediately below. I have not resolved any of the conflicts in their testimony because, in my opinion, those conflicts do not affect the outcome of this proceeding.

Busch's testimony about what was said during the July 3 meeting concerning his tardiness is summarized as follows: McReaken told St. Lawrence that Busch had been late for work; St. Lawrence stated he wanted Busch to be there on time because he held up the job when he was late for work; McReaken stated he wanted Busch to come to work at 6:45 a.m.; Busch replied he would not do that unless Respondent paid him for his time on the job prior to 7 a.m.; Busch suggested that since Respondent did not want to pay him for coming to work before 7 a.m., that it should pay the apprentices to come to work early to set up the job; McReaken asked the apprentices, who were present, if they were willing to come to work early to set up the job; the apprentices asked if they would be paid for doing this; McReaken answered ''no''; and, the apprentices stated they would not come to work before 7 a.m.

St. Lawrence's testimony about what was said during the July 3 meeting concerning Busch's tardiness is summarized as follows: St. Lawrence told Busch he had been told about Busch's chronic tardiness by former Superintendent Walters and by Superintendent McReaken, and stated that now he had personally observed Busch come to work 15 minutes late; St. Lawrence told Busch it was very important for Busch to start work at 7 a.m. as an example to the rest of the employees on the job and stated he expected Busch to arrive on the job prior to 7 a.m. in order to do all of the preliminary work, such as untying the rig, etc. . . . so that he would be ready to start work right at 7 a.m.; Busch's response was that if St. Lawrence wanted him to be on the job before 7 a.m., Respondent would have to pay him for the additional time.

McReaken's testimony about this part of the meeting was that St. Lawrence questioned Busch about being tardy and told Busch that Busch was obligated to run the job and get there on time and set a good example for the apprentices.

Busch testified that after inspecting the work which had been done by Respondent's employees on the job, that St. Lawrence and Sinai questioned Busch about the way in which the work was being done and, in certain respects, instructed him to use different materials and a different work or production technique or procedure. As I have previously found, Busch credibly testified that prior to this meeting he had not been instructed by anyone to change the materials he was using or to change the work or production techniques that he had been previously instructed to use on the job.

St. Lawrence testified that on July 3 when he inspected the work being done at the 120 Montgomery Street job he discovered Busch had not changed certain production techniques or procedures so as to conform to the instructions that St. Lawrence had issued to McReaken several weeks earlier. St. Lawrence testified he asked Busch whether McReaken had communicated those instructions to him and explained to Busch that the new technique or procedure was more economical or efficient. St. Lawrence also testified he was unable to remember whether or not Busch acknowledged that McReaken had instructed him about the new method of production.

McReaken testified that during the July 3 meeting, Respondent's representatives spoke to Busch about the ''work techniques'' being used on the job, namely, that they told him he had been asked to change the work technique, yet the work was all being done the same way as before. However, just as St. Lawrence testified he was unable to remember whether Busch acknowledged that McReaken had instructed him about the new work technique, McReaken was likewise unable to remember what reason Busch gave in response to this accusation. As I have found supra, prior to the July 3 meeting Busch had not been informed by anyone to change the current production or work technique being used on the job.

Busch, after the July 3 meeting, worked at the 120 Montgomery Street job on the following days: July 3, 5, 6, and 8. Based upon his description of the work that was performed on those days—testimony that was not controverted by any evidence presented by Respondent—I find the work performed on the job between July 3 and 10 was consistent with the July 3 instructions Busch received from Respondent's representatives.

On July 10 Superintendent McReaken arrived at the 120 Montgomery Street job at 6:45 a.m. None of Respondent's employees had arrived at the job, so he waited outside of the building to determine if Busch obeyed McReaken's July 3 instruction about being at work by 7 a.m. Busch did not arrive at the jobsite until after 7 a.m.; according to Busch at approximately 7:03 a.m. and according to McReaken at approximately 7:10 a.m. It is undisputed that when they met in front of the building, McReaken reminded Busch that McReaken had told him to be at work on time, stated he thought Busch had lost interest in his work, and told him he was suspended from work; according to Busch for 2 weeks and according to McReaken for a couple of days.

On Friday, July 12, in the morning, St. Lawrence telephoned Busch and told him that after reviewing the situation he had decided to discharge Busch and asked Busch to come to the office that afternoon to get his paycheck.[10]

On July 12, in the afternoon, Busch met with St. Lawrence, in St. Lawrence's office, where he was given his paycheck and had a brief conversation with St. Lawrence.

Busch's testimony about his July 12 termination interview, insofar as it concerns the reason for his termination, may be briefly summarized as follows: St. Lawrence stated he thought Busch was a ''great worker,'' but that ever since Busch's conversation with St. Lawrence in May about the

[10] Busch testified he received this telephone call on July 10 and that his termination interview with St. Lawrence occurred that same afternoon, when he also was given his paycheck, and that later the same afternoon he went to the Union's office where he filed a grievance against Respondent. Busch was mistaken about the date of these events because the paycheck which was given to him at the conclusion of his termination interview is dated July 12, which is also the same date which appears on the grievance he filed with the Union. Accordingly, I find that Busch's termination interview occurred on Friday, July 12.

''issue of travel,'' that St. Lawrence thought Busch had lost confidence in the Company and in St. Lawrence; St. Lawrence stated he thought the situation about the ''travel issue'' had been resolved; Busch responded by stating that the issue had not been resolved, that he had not been given a van, and that McReaken had given him the choice of either being reassigned from the 120 Montgomery Street job or being issued written warnings and fired for being tardy.

St. Lawrence's testimony about the July 12 termination interview, insofar as it concerns the reason for Busch's termination, may be briefly summarized as follows: St. Lawrence asked Busch what had happened; Busch answered he was a couple of minutes late and McReaken had laid him off; St. Lawrence stated Busch was a ''very valuable caulker,'' that the 120 Montgomery Street job was Respondent's most important project, and St. Lawrence was disappointed things had not worked out; St. Lawrence then discussed with Busch the part of their July 3 conversation concerning the importance of Busch starting work on time and, in this respect, St. Lawrence testified he told Busch during the July 12 termination interview, ''I felt with his attitude about the comment that he made [on July 3] that if you want me here earlier you pay me, didn't address the issue of the common sense of getting ready for your job, start[ing] on the right time [and] I told him that I felt that because of this, and not following my direction on the caulking, that I preferred not to lay him off, that I felt he should be terminated.''

As described supra, except for their agreement that St. Lawrence expressed high regard for Busch's work, Busch and St. Lawrence gave sharply conflicting testimony about everything else of significance that was said during Busch's termination interview. I credit Busch's testimony because his testimonial demeanor, which was good, was better than St. Lawrence's, which was poor.

On July 12, immediately after his termination interview, Busch went to the Union's office where he filed a grievance against Respondent alleging Respondent had violated section 6 of article XII of the governing collective-bargaining agreement. As noted supra, this provision provides, ''[w]hen transportation is not furnished by the Individual Employer and employees are requested to use their own cars when traveling from shop to job, or job to shop, they shall receive thirty-five cents per mile.'' In the section of the grievance form entitled, ''what are you asking for?'', Busch stated he was asking for ''[t]ravel pay—mileage for using own car no transportation was provided from shop to job.''

Busch's chronic tardiness

Busch testified that during his approximately 9 months of employment on the 120 Montgomery Street job he was late for work on an average of approximately 1 day each week, but it was not until July 3 that anyone from management spoke to him about his tardiness. Walters and McReaken, the superintendents over the job during that 9-month period, testified they spoke to Busch about his tardiness prior to July 3. I reject their testimony and credit Busch's for the reasons below.

Walters initially testified he spoke to Busch about being tardy for work on ''probably less then five'' different occasions. He subsequently testified that during the period he was superintendent when Busch was employed on the 120 Montgomery Street job, a period of approximately 7 months, he had no recollection of the number of times he spoke to Busch about his tardiness. Walters then volunteered, ''I may not even have spoken to him about being late on that job.'' But then testified he recalled that once, on a Friday, when Busch came to work late after having picked up the employees' paychecks at the San Leandro facility, Walters criticized him for having been late getting to the jobsite. I reject Walters' aforesaid testimony because when he testified about this subject his testimonial demeanor was poor, whereas Busch's was good. Moreover, Walters conceded he may in fact never have spoken to Busch about his tardiness while on the 120 Montgomery Street job.

I previously rejected McReaken's testimony that on July 1 he spoke to Busch about his late arrival for work on July 1. Likewise, I reject McReaken's further testimony that he spoke to Busch about his tardiness prior to July 1 and credit Busch's testimony to the contrary. Not only was Busch's testimonial demeanor, which was good, better than McReaken's, which was poor, but the lack of specificity in McReaken's testimony and the fact that he contradicted himself when he gave this testimony makes his testimony suspect. McReaken initially testified that the first time he talked to Busch about his tardiness was on July 1 (fiMDBUfl*ERR17*fiMDNMflTr. 2 9)fiMDBUfl*ERR17*fiMDNMfl. Then, when asked why he did not speak to B his tardiness before July 1, when supposedly he had been informed during May and June that Busch was holding up the job by coming to work late,[11] McReaken now testified, ''I don't recall. I mean, I'm sure it was mentioned . . . that he should start on time.'' McReaken now testified he was positive of having spoken to Busch about his tardiness prior to July 1. However, other than his conclusionary testimony, McReaken offered no specifics as to when or where or under what circumstances he spoke to Busch or what he said to him or Busch's response. In view of the conclusionary and contradictory nature of McReaken's testimony and his poor testimonial demeanor, I reject his testimony and credit the testimony of Busch, whose testimonial demeanor was good.

My rejection of Walters' and McReaken's above-described testimony that they verbally warned Busch about coming to work late was also prompted by the fact that when Respondent's superintendent believes that employees, including those classified as foremen, are engaging in misconduct, including being late for work, that the superintendent is required by Respondent's policy of progressive discipline to issue a series of written warnings to the employee. Not one written warning was ever issued to Busch, and neither Walters nor McReaken explained, why, if they were critical of Busch's tardiness, they failed to issue a written warning.

Respondent's reasons for discharging Busch

David St. Lawrence, the manager of Respondent's waterproofing division, testified Busch was a talented field technician and an excellent worker, but that St. Lawrence decided to discharge him for two reasons: his ''chronic tardiness''; and ''his inability to follow instructions,'' namely Busch failed to follow the July 3 instructions given to him by St. Lawrence. St. Lawrence further testified that the ''main reason'' he decided to discharge Busch was for his ''chronic

[11] McReaken previously testified that during May and June the workers on Busch's crew told McReaken that Busch was coming to work late and because of this holding up the progress of the job.

tardiness'' and if Busch had not been late for work on July 10 St. Lawrence probably would not have decided to discharge him for his failure to follow the July 3 instructions, but would have asked Busch to explain why he failed to follow those instructions and talked to Busch about his failure to follow the instructions.

St. Lawrence testified he learned Busch arrived for work late on July 10 and had also failed to follow St. Lawrence's July 3 instructions, when Superintendent McReaken telephoned him on July 10 and gave him this information.[12]

B. *Discussion and Conclusions*

1. Busch's supervisory status

Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act, defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Although this language lists the supervisory powers in the disjunctive—so that the exercise of any one of them is sufficient to make an individual a supervisor—it also contains the conjunctive requirement that the power be exercised with ''independent judgment,'' rather than in a ''routine'' or ''clerical'' fashion. This requirement is an expression of Congressional intent to withhold supervisory status from ''straw bosses,'' ''leadmen,'' as well as other low-level employees having modest supervisory authority. *Highland Superstores v. NLRB*, 927 F.2d 918, 920–921 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1991)fiMDBUfl*ERR17*fiMDNMfl. Also, an employee does not become a statutory supervisor if he or she recommends personnel actions, but there is no showing that participation in these personnel actions amount to effective recommendations that the personnel action occur. *Ohio Masonic Home*, 295 NLRB 390, 392 (fiMDBUfl*ERR17*fiMDNMfl1989)fiMDBUfl*ERR17*fiMDNMfl; *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1100–1101 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1981)fiMDBUfl*ERR17*fiMDNMfl; *NLRB v. St. Francis Hospital of Lynwood*, 601 F.2d 404, 421 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1979)fiMDBUfl*ERR17*fiMDNMfl; *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 581 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1965)fiMDBUfl*ERR17*fiMDNMfl.

I also note that the Board in interpreting Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act has been instructed it must not ''construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights.'' *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1981)fiMDBUfl*ERR17*fiMDNMfl; *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1987)fiMDBUfl*ERR17*fiMDNMfl; *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (fiMDBUfl*ERR17*fiMDNMfl7th Cir. 1970)fiMDBUfl*ERR17*fiMDNMfl. Consistent with its duty to avoid any unduly broad construction of supervisory status, the Board has placed the burden of proving that an individual is a supervisor on the party alleging that supervisory status exists. *Health Care Corp.*, 306 NLRB 63 fn. 1 (fiMDBUfl*ERR17*fiMDNMf cases cited therein. See also *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1985)fiMDBUfl* *Bulletin v. NLRB*, 631 F.2d 609, 613 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 198

Respondent's employees are classified as ''foremen,'' ''journeymen'' and ''apprentices.'' Respondent's foremen work for Respondent as journeymen, when there is no work for them as foremen. Busch, who began work for Respondent as a foreman on August 1, 1990, worked for Respondent as a journeyman for a short time period between the end of his job in Stockton, California, and the start of 120 Montgomery Street job herein.

All of Respondent's employees—foremen, journeymen, and apprentices—are represented by the Union in a single bargaining unit. Their terms and conditions of employment are governed by a collective-bargaining agreement between the Union and Respondent. Pursuant to that agreement Respondent's journeymen are paid $21.30 an hour and its ''foremen'' are paid $24.30 an hour. Otherwise the terms and conditions of employment of the foremen are identical to that of the employees classified as ''journeymen.''

Busch was employed as a foreman by Respondent on the 120 Montgomery Street job from sometime in October 1990 until his July 12, 1991 discharge. He was one of either two or four workers assigned by Respondent to that job. Normally there were four workers, including Busch, assigned to the job. Most of the time there were an equal mix of journeymen and apprentices, i.e., two journeymen (fiMDBUfl*ERR17*fiMDNM Busch)fiMDBUfl*ERR17*fiMDNMfl and two apprentices or one journeyman (one apprentice.

Busch was the highest-ranking person employed by Respondent present at the 120 Montgomery Street job, because Superintendent Walters, during his tenure as superintendent, visited the jobsite only about 1 hour a week and after McReaken replaced him as superintendent in May 1991, McReaken visited the jobsite on only a couple of occasions. However, the Superintendent was available at any time for Busch to contact by telephone. In fact, it is undisputed that each morning and sometimes in the evenings as well, Busch spoke to the superintendent over the telephone to inform him about what was taking place on the job and to receive his daily instructions from the superintendent, which Busch in turn relayed to the other employees employed on the job.

Busch spent 7 of the 8 hours of his workday doing the identical work as the other employees employed on the job and the remainder of his workday was spent doing the following: talking to the superintendent over the telephone and relaying the superintendent's instructions to the other employees; showing inexperienced apprentices how to use their tools and how to work safely; getting needed materials; filling out and transmitting the employees' timesheets; and planning ahead for the next workday.

Respondent's manager, St. Lawrence, testified that at virtually each of the regular meetings he held with the employees of the waterproofing division,[13] he told the employees, including Busch and the other foremen, that Respondent con-

[12] McReaken testified that on July 10 after speaking with St. Lawrence over the telephone about Busch's conduct, that he wrote a memorandum to St. Lawrence about the events of July 1, 3, and 10 (fiMDBUfl*ERR17*fiMDNMflG.C. Exh. 3)fiMDBUfl*ERR17*fiMDNMfl. He testified he personally gave this memorandum to St. Lawrence on July 10. However, St. Lawrence testified McReaken did not give him the memo, but placed it in the interoffice mail and because of this St. Lawrence did not receive it until the next day. St. Lawrence testified he decided to discharge Busch prior to reading the memorandum.

[13] The record reveals that these meetings were also attended by Respondent's waterproofing superintendent and general superintendent.

sidered its foremen to be ''key people,'' who were ''supervising people,'' and told them that the foremen had the following authority: to shut the job down if it became unsafe due to the wind; to terminate employees who did not do their work correctly; to request specific persons be assigned as employees to their jobs; to refuse to employ a person on their jobs; and the authority to chose which employees will do which tasks on their jobs. St. Lawrence's testimony was not contradicted by Busch, who was not asked whether St. Lawrence made the above remarks. However, St. Lawrence's testimonial demeanor—his tone of voice and the way he looked and acted while on the witness stand—was poor. I received the impression from my observation of him that he was tailoring his testimony to fit Respondent's theory of the case, rather than making a sincere and conscientious effort to remember what he actually said and did in connection with the events which are material to this case. This, when considered with the lack of corroboration for his above-described testimony, has persuaded me to reject it.

In its posthearing brief Respondent does not point to any record evidence which even colorably establishes Busch possessed the authority to transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or to effectively recommend such action. Nor does the record contain any evidence, other than St. Lawrence's above-described incredible testimony,[14] which even colorably establishes that he possessed any one of those powers. Therefore, what is left for consideration is whether Busch possessed the authority to ''hire,'' ''assign'' or ''responsibly to direct'' other employees, or ''effectively'' to recommend such action, ''if in connection with the foregoing the exercise of such authority [was] not of a merely routine or clerical nature, but require(fiMDBUfl*ERR17*fiMDNMfld)fiMDBUfl*ERR17*fiMDNMfl the use of independent judgment.''

Respondent's contention that Busch possessed the authority to effectively recommend that other employees be hired[15]

Respondent contends that during Busch's approximately 11 months of employment with Respondent as a foreman, he effectively recommended the hire of two job applicants; Kirk Sandoval and Mario Barnes. The evidence pertinent to an evaluation of this contention follows:

In the affidavit Busch submitted to the Board during the investigation of his charge in this case, he stated, among other things, that ''as foreman I had the authority to recommend that someone got hired.'' Busch's undenied testimony is that no one ever told him he had this authority. He testified the reason why he included this statement in his affidavit was that during his employment with Respondent, he was asked by management on two occasions how he felt about job applicants whom he had worked with previously. He was referring to Respondent's hiring of Sandoval and Barnes. The record reveals that Busch's involvement in their hire was as follows.

Busch had worked with Sandoval prior to coming to work for Respondent. Sandoval applied for a job with Respondent and used Busch's name as a reference. Superintendent Walters asked if Busch was in fact familiar with Sandoval's work. Busch informed Walters he had worked with Sandoval on a couple of occasions. Walters asked if Sandoval knew how to do Respondent's type of work and if he was a responsible person. Busch answered that when he worked with Sandoval that Sandoval had demonstrated he knew how to caulk and was a responsible person. Busch recommended Respondent hire Sandoval. Subsequently, Walters interviewed Sandoval and thereafter Sandoval was hired.

Prior to coming to work for Respondent, Busch had worked with Barnes on a job which involved work similar to the type of work Respondent was doing at the 120 Montgomery Street job. Barnes told Busch he wanted to work for Respondent. Busch went to Superintendent Walters and recommended to Walters that Walters interview Barnes for a job. Busch explained to Walters why he believed that Barnes would be suitable for employment with Respondent. Subsequently, Walters interviewed Barnes and thereafter he was hired.

The aforesaid facts concerning the hiring of Sandoval and Barnes are based upon Busch's undenied and uncontroverted testimony. Walters, a witness called by Respondent, was not questioned about his interviews with Sandoval and Barnes, or about the weight, if any, that was given to Busch's recommendation that they be hired, nor was he questioned about any of the other circumstances surrounding Sandoval's and Barnes' hire.

As described supra, Respondent did not present evidence that its decision to hire Sandoval and/or Barnes was the result (fiMDBUfl*ERR17*fiMDNMfl)in whole or even in part)fiMDBUfl*ERR17 As I have previously indicated, the law is settled that although an individual is empowered to recommend that other employees be hired or fired or disciplined or rewarded, this authority is insufficient to satisfy the statutory standard for supervisors unless their superiors are prepared to implement these recommendations without an independent investigation or evaluation. *Waverly-Cedar Falls Center v. NLRB*, 933 F.2d 626, 628 (fiMDBUfl*ERR17*fiMDNMfl8th Cir. 1991)fiMDBUfl*ERR17* *ter*, 284 NLRB 887, 891 (fiMDBUfl*ERR17*fiMDNMfl1987)fiMDBUfl*ERR *Convalescent Center*, 275 NLRB 943, 945–946 (fiMDBUfl*ERR17*fiMDNMfl Respondent failed to present any evidence whatsoever as to what weight, if any, it gave to Busch's recommendations in deciding whether to hire Sandoval and Barnes. Absent evidence that his recommendations were effective, they do not establish supervisory authority. *Valley Mart Supermarket*, 264 NLRB 156, 161 (fiMDBUfl*ERR17*fiMDNMfl1982)fiMDBUfl*ERR17*fi 661 F.2d 1095, 1099–1100 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1981)fiMDBU

It is for the reasons set forth above that I reject Respondent's contention that Busch possessed the authority to effectively recommend that other employees be hired.

Respondent's contention that Busch possessed the authority to assign and responsibly direct other employees and that such authority was not of a merely routine or clerical nature, but required the use of his independent judgment

Busch lacked the authority to assign employees to work on the 120 Montgomery Street job. The employees were assigned to work on this job by Respondent's superintendent,

[14] In contending that the record contains evidence which establishes Busch was a statutory supervisor, I note Respondent, in its posthearing brief, does not rely upon St. Lawrence's above-described testimony.

[15] There is no contention nor evidence that Busch possessed the authority to hire other employees.

who assigned different employees to the job every other day. On those occasions when Busch asked that the superintendent send him a particular person, his request was usually denied for no expressed reason or because the employee requested was employed on another job.

The various work techniques and materials used by the employees on the job were prescribed by Respondent's project manager and by the materials' representatives and by the building owner's inspectors. They told Busch what work techniques and materials the employees were to use and Busch relayed those instructions to the other workers. In addition, each morning, and sometimes in the evening as well, Respondent's superintendent spoke to Busch by telephone, and gave him instructions about the work which was to be performed that day or the next day. Busch, in turn, relayed those instructions to the other employees employed on the job. In other words, in directing the other employees in their work Busch was merely following the instructions furnished by Respondent and others; he was not required to exercise any independent judgment, but routinely transmitted to the other employees on the job the instructions and directions he received from others.

On most days there were two journeymen (fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl other)fiMDBUfl*ERR17*fiMDNMfl and two apprentices assigned to work on the 120 Montgomery Street job. Consistent with the industrywide practice of having an apprentice work with a journeyman, as a matter of routine Busch worked with one of the apprentices on a rig and the other apprentice worked with the other journeyman on the other rig. In following the practice of having a journeyman work with an apprentice, Busch was not exercising the type of independent judgment contemplated by Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act, but was merely following the usual routine practiced in the industry.

Busch, during his employment on the 120 Montgomery Street job, instructed apprentices who had never worked on a high rise building, how to place their tools on the rig in such a way so they would not fall off onto a passing pedestrian. Busch also instructed inexperienced apprentices, who had never done the type of work being done on the 120 Montgomery Street job, how to use their tools and how to cut out and replace caulking. The aforesaid instructions given to apprentices by Busch, in my view, did not establish he had the authority to responsibly direct other employees within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act, but rather in giving those instructions he was not required to use ''independent judgment,'' inasmuch as the instructions involved nothing more than the authority of a skilled employee over an unskilled employee. Any doubt that this was the case is removed by the undisputed fact that the other journeymen employed on the job gave the same instructions to the apprentices they worked with, as Busch gave to the apprentices he worked with. Also, when Busch worked on a job as a journeyman, he gave the same instructions to the apprentices on those jobs that he gave to the apprentices employed on the 120 Montgomery Street job.

One of Busch's responsibilities as Respondent's foreman on the 120 Montgomery Street job was to hold a weekly safety meeting. During those meetings he reminded the other employees to do the following: make sure their tools were in a safe place so they would not fall from the rig onto people passing below; be careful when moving the rig up or down the side of the building; when moving the rig always keep eye contact with the other person on the rig; and while working on a rig always be aware of the entire environment. These safety instructions had been communicated to him by Respondent and by the company from whom Respondent was renting the rigs and had also previously been expressed to Busch while employed on other jobs in the industry.

The instructions Busch gave during the weekly safety meetings do not establish he possessed the authority to responsibly direct other employees, as contemplated by Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act. I which Busch repeated each week, constitute routine communication of standard safety procedure dictated by established policy, thus his communication of these safety rules lacked the type of independent judgment contemplated by Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act.

The workday at the 120 Montgomery Street job was from 7 a.m. to 3:30 p.m. It is undisputed, however, that Busch received permission from Superintendent Walters that Busch and the other employees on the job could leave early, if during the regular workday they did not take their two 10-minute break periods, but instead worked during those two periods. The record establishes that normally the employees stopped work on the building at approximately 2:45 p.m., pursuant to Busch's direction, and, at that time, tied up the rig, stored their tools in the basement of the building, and went out onto the area surrounding the building to clean up the debris caused by their work (fiMDBUfl*ERR17*fiMDNMflcollectively th When they finished the cleanup, Busch told them to go home.

Respondent contends that the fact Busch directed the other employees to stop work and start the cleanup and after they finished the cleanup told them to go home, establishes he possessed the authority to responsibly direct other employees within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*E

In directing the employees to stop work and start the cleanup and then, after they finished with the cleanup, directing them to go home, Busch was simply following the established routine of stopping work on the job at approximately 2:45 p.m. for the daily cleanup and ending the workday when, after the employees finished their cleanup, they had no more work to do. There was no independent judgment involved in Busch's conduct. In fact, whenever Busch concluded it might be necessary to deviate from the usual cleanup routine by starting the cleanup or giving those usual 2:45 p.m. starting time, due to a greater than usual amount of debris, Busch telephoned the superintendent and asked for his permission to start the cleanup earlier. Respondent makes much of the fact that Busch allowed the employees to leave work when they finished the cleanup, even though it was prior to the 3:30 p.m. quitting time, and submitted timesheets authorizing that they be paid through 3:30 p.m. However, in doing so Busch was not exercising his independent judgment, but was following Superintendent Walters' instruction that if Busch and the other employees on the job did not take the 20 minutes of breaktime they were entitled to, they could leave work early and be compensated as if they worked until 3:30 p.m.

As previously described, the 120 Montgomery Street job involved a 25-story commercial office building. Respondent had contracted to cut out all of the old caulking and grout joints on the outsides of the building and to recaulk it. The employees employed by Respondent did their work standing

on scaffolding (fiMDBUfl*ERR17*fiMDNMflrigs)fiMDBUfl*ERR17*fiMDNMfl which were suspended from the roof of the building by strands of cable.

One of Busch's responsibilities as foreman was to inform Respondent's superintendent when the wind made it too dangerous for Busch and the other employees on the job to work. Busch determined whether it was not safe to work because of the wind by looking at the way the flags on the adjacent buildings were waving and observing whether the wind was causing the rigs to move back and forth or away from the 120 Montgomery Street building.

If Busch observed the wind was blowing strong enough to cause the rigs to move back and forth or away from the building, he telephoned Respondent's superintendent and, as he testified, the following conversation usually occurred: Busch informed the superintendent, ''it's really windy out here, flags are blowing, the rig is blowing back and forth, what do you want me to do?''; the superintendent replied, ''well, if it's too windy send everybody home''; and, Busch answered, ''okay.'' Busch then told the other employees that the superintendent stated they should go home and instructed them to clean up before leaving.

Walters, the superintendent when the 120 Montgomery Street job began in October 1990 until the beginning of May 1991, testified that whether the employees on that job worked on a windy day was left to Busch's discretion. He testified Busch decided whether the working conditions were unsafe after evaluating the wind conditions. Walters further testified that after Busch evaluated the wind conditions and decided to send the employees home because it was too windy, only then would he telephone Walters and inform him of his decision. Busch denied this is what occurred. Busch testified he did not have the authority to send the employees home and that no one from Respondent ever told him he had that authority. More specifically, he testified that on the days when the wind was strong enough to move the rigs back and forth or away from the building, that he telephoned Walters and, as described above, described to Walters what was occurring and asked what Walters wanted him to do, and that Walters replied that if it was too windy to send everyone home. I reject Walters' testimony, insofar as it conflicts with Busch's, because Busch's testimonial demeanor, which was good, was better than Walters', which was poor.

Normally when Busch telephoned the superintendent and told him that the winds were moving the rigs back and forth, the superintendent, as described above, instructed him to shut the job down and send the employees home. However, on a few of those occasions Superintendent Walters did not do this, but instead instructed Busch that Busch and the other employees should remain at the jobsite on standby for another hour and wait to see if the wind died down, and instructed Busch that if the wind in fact died down within the hour that Busch and the others should go back to work.

On one or two mornings, prior to the start of the workday, Superintendent Walters, who knew that it was very windy that day, told Busch that Busch and the other employees on the job should try to work, but if it was too windy they should go home, and instructed Busch to use his own judgment about whether or not it was too windy for the employees to work safely.

It is undisputed that on two different occasions one of the journeymen employed on the job felt it was too windy for [illegible] continue working, suspended from the roof, without Busch's permission, and telephoned Superintendent Walters and told Walters he felt it was too windy for him to continue work, and Walters gave him permission to go home, whereas Busch and the other employees continued to work.

Respondent contends that the above-described evidence, which shows that Busch directed the employees to cease work and go home when it was too windy to work, establishes he possessed the authority to ''responsibly direct,'' as that phrase is used in Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*E because, as described supra, on most of the occasions when this occurred, Busch had informed the superintendent of the objective criteria which indicated that it was too windy for the employees to work safely—the blowing of the flags and the movement of the rigs back and forth or away from the building—and it was the superintendent, who, after considering the objective criteria, made the decision to send the workers home. I considered that in deciding whether to send the workers home the superintendent, who was not at the jobsite, had to rely on Busch's description of the wind and its effect on the rigs. In view of this consideration, Respondent apparently takes the position that when Busch advised the superintendent about the wind conditions that were moving the rigs back and forth, that Busch was making an effective recommendation that the job be shut down and the workers sent home. I disagree. In my opinion Busch did not exercise significant discretion or independent judgment when he communicated to the superintendent what he observed about the wind and its effect on the rigs, for when certain objective facts manifested themselves—wind which was sufficient to cause the rigs to move back and forth or away from the building—Busch was required as a matter of routine safety practice to communicate that information to the superintendent so as to alert the superintendent that the working conditions were unsafe.

Alternatively, I am of the view, that even assuming the record establishes Busch possessed the authority to ''responsibly direct'' employees to cease work on the occasions that the wind made it unsafe to work, at the very most, this is only a very restricted, and sporadic kind of authority, limited to a certain specific predetermined kind of direction, namely, directing employees to cease work when it becomes too windy to work safely. I do not believe that ''authority'' so narrowly confined in time and scope, if it can be said to exist at all, is sufficient to establish supervisory status. For, as I have found supra, in all other respects Busch's direction of the other employees did not require the use of independent judgment, but was of a routine nature or pursuant to the instruction of others. See *Dad's Foods*, 212 NLRB 500, 501 (fiMDBUfl*ERR17*fiMDNMfl1974)fiMDBUfl*ERR17*fiMDNMfl (fiMDBUfl* for intoxication or for fighting on job found not to possess the authority to discharge within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl where in all to discharge other employees)fiMDBUfl*ERR17*fiMDNMfl.

It is for all of the reasons set forth above, I reject Respondent's contention that Busch possessed the authority to assign or responsibly direct other employees and that such authority was not of a merely routine or clerical nature, but required the use of independent judgment. Rather I find Busch did not possess the authority to assign or responsibly direct, as those terms are used in Section 2(fiMDBUfl*ERR17*fiMDNMfl11)f

Respondent's contention that Busch's job title and his higher rate of pay and that he filled out the employees' daily timesheets establishes his supervisory authority

In support of its claim that Busch was a statutory supervisor, Respondent also points to the above-described factors, not expressly listed in Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act, which are customarily referred to as secondary indicia of supervisory authority. However, where, as here, there is no evidence Busch possessed any one of the several indicia for a supervisor enumerated in Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl of the Act, the aforesaid secondary indicia which are not indicators of supervisory authority within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl, are insufficient to establish that Busch was a statutory supervisor, because the law is settled that ''secondary indicia of supervisory status . . . are in themselves not controlling.'' *Bay Area Los Angeles Express*, 275 NLRB 1063, 1080 (fiMDBUfl*ERR17*fiMDNMfl1985)fiMDBUfl*ERR17*fiMDNMfl; quoting *Memphis Furniture Mfg. Co*., 232 NLRB 1018, 1020 (fiMDBUfl*ERR17*fiMDNMfl1977)fiMDBUfl*ERR17*fiMDNMfl. Thus, it is settled that in determining whether a person is a statutory supervisor that job titles are not controlling since they are ''unimportant'' or ''irrelevant'';[16] that the receipt of higher pay is ''of no legal significance'' in determining whether an employee is a superior. *NLRB v. Sayers Printing Co*., 453 F.2d 810, 815 (fiMDBUfl*ERR17*fiMDNMfl8th Cir. 1971)fiMDBUfl*ERR17*fiMDNMfl; *Oil, Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 242 (fiMDBUfl*ERR17*fiMDNMfl D.C. Cir. 1971)fiMDBUfl*ERR17*fiMDNMfl (fiMDBUfl*ERR17*fiMDNMfl the disparity of compensation cannot be ''accorded litmus paper significance in the absence of solid evidence of the possession of supervisory responsibility'')fiMDBUfl*ERR17*fiMDNMfl; and the task of recording and submitting to management the employees' working time is merely routine and clerical and not indicative of supervisory status. *John N. Hansen Co*., 293 NLRB 63, 64 (fiMDBUfl*ERR17*fiMDNMfl1989)fiMDBUfl*ERR17*fiMDNMfl, and cases cited thereun.

Moreover, the above-described secondary indicia relied upon by Respondent are offset by Respondent's recognition of the Union as the exclusive bargaining representative of its foremen, as well as its other rank-and-file employees in a single bargaining unit, and the fact that the working conditions of Respondent's foremen, including Busch, which are governed by the Union's contract with Respondent, are essentially identical to that of the other rank-and-file employees, except for the higher hourly rate of pay received by the foreman. Busch, like the other rank-and-file employees, was paid by the hour, and paid for his overtime and received the same fringe benefits and worked under the same work rules as the other rank-and-file employees. In addition, he spent 7 of the 8 hours of his workday doing the identical work as the other employees.

Nor was Busch a statutory supervisor because he was the highest ranking employee on the job. The absence of a statutory supervisor did not confer any greater authority upon Busch, particularly because of the small number of employees on the job and the nature of the work which enabled Respondent's superintendent to supervise the job by communicating with Busch over the telephone. Thus, it is undisputed Busch was able to communicate with the superintendent at any time by telephone and that regularly on a daily basis the superintendent gave directions and instructions to Busch which Busch relayed to the other employees. *Tri-County Electric Cooperative*, 237 NLRB 968, 969 (fiMDBUfl*ERR17*fiMD
(fiMDBUfl*ERR17*fiMDNMfljobsite foremen were employees, even though a
pervisor appeared at the jobsite ''as infrequent as once a
month,'' because employees had a ''two-way radio to contact
the admitted supervisor when unusual circumstances arose'')fiMDBUfl*ERR17*
NLRB v. KDEW-TV, Inc., 790 F.2d 1273, 1279 (fiMDBUfl*ERR17*fiMDN
1986)fiMDBUfl*ERR17*fiMDNMfl (fiMDBUfl*ERR17*fiMDNMfl ''absence of
tion does not show that workers must be supervisors, where
admitted supervisors were available for consultation'' even
though not present at station)fiMDBUfl*ERR17*fiMDNMfl; see also *Beth Isra
Center, 229 NLRB 295, 296 (fiMDBUfl*ERR17*fiMDNMfl1977)fiMDBUfl*E
Tube Co., 545 F.2d 1320 (fiMDBUfl*ERR17*fiMDNMfl2d Cir. 1976)fiMDBUfl

Conclusionary Finding

For the reasons set forth supra, I conclude Respondent failed to establish that Busch possessed any of the indicia of supervisory authority enumerated in Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMDNMfl11)f
I therefore find that Busch was not a supervisor within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl11)fiMDBUfl*ERR17*fiMD

2. Busch's discharge

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (fiMDBUfl*ERR17*fiMD
1971)fiMDBUfl*ERR17*fiMDNMfl; *Oil, Chemical* &
the Supreme Court endorsed the Board's *Interboro* doctrine[17]
which recognizes that an employee's ''honest and reasonable
invocation of a collectively bargained right constitutes con-
certed activity, regardless of whether the employee turns out
to have been correct in his belief that his right was vio-
lated.'' Id. at 840. Although the Supreme Court observed that
the ''principal tool by which an employee invokes the rights
granted him in a collective-bargaining agreement is the proc-
essing of a grievance according to whatever procedures his
collective-bargaining agreement establishes,'' the Court also
included within the ambit of concerted activity a protest to
the employer rather than the filing of a formal grievance. Id.
at 836. The Court also concluded that in voicing a complaint
the complaining employee need not explicitly refer to the
collective-bargaining agreement as the basis for the com-
plaint, but that ''[a]s long as the nature of the employee's
complaint is reasonably clear to the person to whom it is
communicated, and the complaint does, in fact, refer to a
reasonably perceived violation of the collective-bargaining
agreement, the complaining employee is engaged in the proc-
ess of enforcing the agreement.'' Id. at 840.

In view of the Court's decision in *City Disposal*, it is set-
tled that when an employee, who, in complaining to his em-
ployer about his terms and condition of employment, asserts
a right grounded in the governing collective-bargaining
agreement, that the employee is engaged in concerted activity
protected by Section 7 of the Act, and that if the employer
discharges the employee for such activity, the discharge vio-
lates Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(f
Counsel contends this is what occurred in the instant case.
Respondent contends Busch's discharge did not violate the
Act because he was a statutory supervisor and even if he was
not a statutory supervisor, his complaints to Respondent do
not constitute protected concerted activity, and, even if they
do, he was not discharged because of them, but for legitimate
business reasons. As I have found supra, Respondent failed
to establish Busch was a statutory supervisor, and, for the

[16] *Walla Walla Union-Bulletin Inc. v. NLRB*, 631 F.2d 609, 613 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1980)fiMDBUfl*ERR17*fiMDNMfl; *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 837 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1977)fiMDBUfl*ERR17*fiMDNMfl; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1971)fiMDBUfl*ERR17*fiMDNMfl; *Timken Roller Bearing Co*., 157 NLRB 1295 (fiMDBUfl*ERR17*fiMDNMfl1966)fiMDBU

reasons set forth infra, I am also of the opinion that, as contended by the General Counsel, the record establishes Respondent's discharge of Busch was motivated by his protected concerted activity, in violation of Section 8(fiMDBUfl*ERR17*fiMDNMfl)(fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl the Act.

As found supra, all of Respondent's foremen, except for Busch, normally were assigned a van to drive to and from Respondent's facility and their jobs and were paid ''drive time'' for the time they spent driving the van. Also, as found supra, beginning in September 1990 and ending in late May or early June 1991, Busch complained on five different occasions to Respondent's manager, St. Lawrence, that Respondent was not providing him with a van for transportation to and from the job and ''drive time'' for driving the van. In voicing this complaint, Busch also stated that if Respondent did not provide him with a van and pay him ''drive time'' for driving it, that as an alternative it was obligated to pay him what he sometimes referred to as ''travel pay,'' for the cost and expense he was incurring in getting to and from work. However, it is clear from the content of Busch's conversations with St. Lawrence, described in detail supra, that Busch made it clear he was primarily interested in having Respondent treat him like the rest of the foremen by assigning him a van for transportation and paying him ''drive time'' for driving the van, and was insisting on so called ''travel pay'' only as an alternative if Respondent did not furnish him with a van and pay him ''drive time.''

It must have been reasonably clear to Respondent that Busch's demand for a company van and ''drive time'' pay for driving it to and from work, or, in the alternative, for ''travel pay,'' was based upon the terms contained in Respondent's collective-bargaining agreement with the Union. I recognize that Busch initially did not specifically inform Respondent that his above-described demand was based upon the provisions of the collective-bargaining agreement. However, when the language of the travel section of the agreement, article 12, set forth in detail supra, is compared with Busch's demand, as expressed in his several conversations with St. Lawrence, Respondent must have realized that Busch's demand, whether it had merit or not, was based upon the provisions set forth in article 12 of the collective-bargaining agreement. In any event, any doubt Respondent may have had about this was removed when, in late May 1991 or early June 1991, Busch expressly told St. Lawrence that Busch's complaint about Respondent's failure to provide him with transportation to the job in the form of a van or, in the alternative, to reimburse him for his travel costs and expense, was based upon his understanding of the ''union contract.''

Busch's insistence that Respondent provide him with a van for transportation to and from work and ''drive time'' pay when he drove the van, or, in the alternative, ''travel pay'' for the costs and expense incurred in getting to and from work, was based on his honest and reasonable belief that he was entitled to these working conditions under the terms of the Union's collective-bargaining agreement with Respondent.

The reasonableness of Busch's belief is supported by the terms of the collective-bargaining agreement: Section 1, article 12 provides, in substance, that employees are to report to the Respondent's facility each day for work and may not be required to report directly to their jobs; section 2, article 12 provides, in substance, that an employee who drives a vehicle from Respondent's facility to the job, at the start of the workday, and back to the facility, at the end of the workday, shall be compensated for the actual time spent driving the vehicle during those periods, herein previously referred to as ''drive time'' pay; it is Respondent's usual practice to have its foremen drive company vans to and from their jobs, and it is also undisputed that Respondent and the Union interpret the aforesaid provisions of the agreement as meaning that the drivers of the Respondent's vans, the employees' classified as foremen, must be paid for their ''drive time''; section 6, article 12 provides, in substance, that if Respondent fails to furnish transportation to its employees from its facility to their jobs, and when its employees are requested to use their personal vehicles to travel to and from the jobs, they must be paid 35 cents per hour from the shop to the job and from the job back to the shop; and section 3 of article 12 provides, in substance, that when employees travel from Respondent's facility to the job and the job is located beyond a 15-mile ''free zone'' radius from Respondent's facility, the employees must be compensated up to a maximum of $34 daily for their costs and expenses.

I considered that Busch's job, the 120 Montgomery Street job, was within the 15-mile free zone radius, as that term is interpreted by the Respondent and the Union, and that in October 1990 Union Representative Boyer told Busch he was not entitled to the $34-a-day per diem payments because his job was within the free zone. However, the actual driving distance between the 120 Montgomery Street job and Respondent's facility was more than 15 miles and Busch, during the time material, knew this. It was because of this that he thought the job was outside of the 15-mile radius, which the agreement stated comprised the ''free zone.'' He did not understand that actual driving mileage is not used to measure what is defined as a ''radius.'' I am of the view that it was not unreasonable for an unsophisticated employee, such as Busch, to fail to understand this. In any event, as found supra, Busch made it clear to Respondent that he was primarily interested in having Respondent treat him like all of its other foremen, by assigning him a van for transportation and paying him ''drive time'' pay for driving the van, and was only insisting on being paid so-called travel pay, which included the $34 a day per diem, as an alternative, if Respondent did not furnish him with a van and pay him for his ''drive time.'' Moreover, under any interpretation of article 12 of the collective-bargaining agreement, Busch had good reason to believe that Respondent was violating the terms of the Agreement by failing to provide him with transportation to the job.

The conclusion that Busch honestly and reasonably invoked his collectively bargained for rights by insisting that Respondent provide him with a van and ''drive time'' pay for driving it, or, in the alternative, pay him ''travel pay'' for the cost and expense he incurred in getting to and from work, is also supported by the fact that in October 1990, when Busch went to the Union and complained to the Union's Business manager, Boyer, that Respondent was not providing him with a van for transportation and that he was not being reimbursed for his travel, Boyer replied by informing Busch that he was entitled to a van for transportation and to reimbursement for his travel, but suggested that Busch present his complaint to Respondent's management instead

of filing a grievance with the Union. Busch followed Boyer's suggestion.

It is also significant that Respondent did not tell Busch his complaint lacked merit. He was not informed by Respondent that under the terms of the governing collective-bargaining agreement he was not entitled to a company van for transportation or ''drive time'' pay. Nor was he told by Respondent that he was not contractually entitled to his alternative request for ''travel pay'' of 35 cents per mile and/or a daily per diem payment. No such explanation was given to Busch by Respondent, even after Busch specifically informed Respondent that his belief that he was entitled to those benefits of employment was based upon the terms of the union contract. Rather, as described supra, Respondent's response to Busch's complaint was to tell him that since Respondent was always doing favors for Busch and Respondent's other foremen, that Respondent expected Busch to return those favors by dropping his complaint, and when Busch indicated he did not intend to drop the complaint, Respondent, as described in detail supra, answered by threatening to demote or discharge him for tardiness if he continued to press his complaint. Obviously, the manner in which Respondent replied to Busch's complaint was reasonably calculated to lead Busch to believe that his complaint was meritorious and to reinforce Busch's belief that he had the right to what he was asking for under the terms of the governing collective-bargaining agreement. Respondent is now hard pressed to question the honesty, sincerity, or reasonableness of Busch's belief, when it never told Busch that his interpretation of the contract was incorrect, but instead gave Busch every reason to believe that his complaint had merit.

It is for the above-reasons that I conclude Busch honestly and reasonably invoked his collectively bargained for rights by insisting Respondent provide him with transportation to and from his job in the form of a company van and ''drive time'' pay for driving the van, or, in the alternative, give him ''travel pay,'' regardless of whether he was correct in his belief that his rights were in fact violated. I therefore find on the basis of the criteria enunciated in *City Disposal Systems* that the complaint of Busch concerning violations of the contract involving terms and conditions of employment constituted protected concerted activity within the meaning of Section 7 of the Act.[18]

I now consider the question whether the Respondent discharged Busch because of his protected concerted activity. Under *Wright Line*, 251 NLRB 1083 (fiMDBUfl*ERR17*fiMDNMfl1980)fiMDBUfl*ERR17*fiMDNMfl, the General Counsel must make a prima facie showing that Busch's protected conduct was a motivating factor in the Respondent's decision to discharge him. Once this is established, the burden shifts to the Respondent to demonstrate the same action would have taken place even in the absence of the protected conduct.[19] Of course, where it is shown that the employer's proffered justification is only a pretext, the analysis of the employer's motivation is logically at an end. As the Board has explained, once it is proved that the reason advanced by the employer did not exist, or was not, in fact, relied upon, there is no remaining predicate for any determination that the adverse action would have been taken even in the absence of protected activity. *Wright Line*, supra at 1084. See also *Postal Service*, 275 NLRB 510 (fiMDBUfl*ERR17*fiMDNMfl1985)fiMDBUfl*E

For the reasons set forth below, I find the General Counsel has established that a motivating factor in Respondent's decision to discharge Busch was Respondent's hostility toward him for his protected concerted activity; namely, for insisting Respondent provide him with a company van for transportation and with ''drive time'' pay for driving the van, or, in the alternative, pay him ''travel pay.'' I am also of the opinion, for the reasons below, that Respondent failed to establish Busch would have been discharged even absent his protected concerted activity.

Respondent was extremely hostile to Busch and threatened to demote or discipline and discharge him for insisting that Respondent provide him with a company van for transportation and with ''drive time'' pay, or, in the alternative, pay him ''travel pay.'' This conclusion is based upon the findings set forth in detail supra, which are briefly summarized as follows.

The initial response of Respondent's manager, St. Lawrence, to Busch's above complaint was to ask why Busch was making such a big deal out of ''this little issue'' and then to suggest Busch owed Respondent a favor which he could repay by dropping his complaint. Busch ignored St. Lawrence's suggestion and made it clear he intended to continue to press his complaint until it was resolved. Eventually, late in May or early June 1991, on the fifth occasion Busch spoke to St. Lawrence about his complaint, Busch told St. Lawrence that his complaint was no longer negotiable because he believed he was entitled to what he was asking for under the terms of the union contract. The next day, Superintendent McReaken, who was present the day before when Busch spoke to St. Lawrence, told Busch he had spoken to General Superintendent Conley about Busch's complaint and Conley had instructed McReaken to tell Busch that Busch would not receive a company van and for Busch ''to leave the issue alone.'' McReaken also warned Busch that Conley had threatened to either demote or discipline and discharge Busch for his tardiness, if Busch did not obey Conley's instruction to stop complaining.[20]

[18] Respondent contends Busch's complaints herein did not constitute protected concerted activity because they were part of his insubordinate refusal to obey the working conditions established by Respondent and constituted an attempt by Busch to establish his own terms and conditions of employment. This contention is based upon Respondent's further contention that the record establishes the following: that on February 26, 1991, Respondent's General Superintendent Conley, responded to Busch's complaint by agreeing to assign him a van for transportation to and from the job and Respondent's facility and to pay him for his ''drive time,'' and, that Busch refused to use a company van, but instead defied Conley's by continuing to use BART to transport himself to and from work, while still insisting that Respondent pay him ''drive time'' and/or reimburse him for his travel. For the reasons set forth previously, I have found that the record evidence relied upon by Respondent in support of this contention is incredible.

[19] See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (fiMDBUfl*ERR17*fiMDNMfl1983)fiMDBUfl*ERR17*fiMDNMfl, in which the Supreme set forth in *Wright Line.*

[20] I considered that McReaken, in his conversation with Busch, did not expressly voice the above-described threat. Rather, after informing Busch that Conley stated Busch would not receive a company van and should leave the issue alone, McReaken remarked that Conley also stated Busch had the choice of being demoted from his job as foreman or of being written up and fired for his tardiness. This latter remark, when viewed in its context, constitutes a none-

Continued

During the same time period Superintendent McReaken also told Respondent's project manager, Barnes, that if Busch did not stop complaining about his ''travel pay'' that Respondent intended to discharge him for his tardiness. McReaken, who less than a month earlier had replaced Walters as superintendent, told Barnes that Busch was ''still whining about . . . travel pay,'' and stated that while former Superintendent Walters could not handle the matter, McReaken knew how to ''fix'' Busch. McReaken explained to Barnes that if Busch was late three more times, McReaken intended to fire him and that would be ''the end'' of Busch's complaints about travel pay.

On the day Superintendent McReaken told Busch that General Superintendent Conley had threatened to demote or discipline and discharge him if he did not discontinue insisting Respondent supply him with a company van for transportation, Busch, later that day, informed former Superintendent Walters about Conley's message. Walters, who was now employed by Respondent in another position, explained to Busch that Conley's reason for disliking Busch was Conley thought Busch was a ''whiner'' who was persistent about his ''union rights.''

It is for all of the above-reasons that I find the record establishes Respondent was extremely hostile to Busch and threatened to demote or discipline and discharge him, for insisting Respondent assign him a company van for transportation to and from work and pay him ''drive time'' pay for driving the van, or, in the alternative, pay him ''travel pay.''

Also relevant in assessing Respondent's motivation for discharging Busch is that during Busch's termination interview, St. Lawrence indicated to Busch that a motivating factor for his decision to discharge Busch was Busch's insistence on being assigned a company van with ''drive time'' pay, or, in the alternative, being paid ''travel pay.'' During the interview, St. Lawrence, after telling Busch that he was a ''great worker,'' brought up the subject of Busch's aforesaid complaint. St. Lawrence remarked that he thought the ''travel issue'' had been resolved and stated that ever since Busch had confronted St. Lawrence about the ''issue of travel,'' that St. Lawrence thought Busch had ''lost confidence'' in both the Company and in St. Lawrence. St. Lawrence offered no other reason during the termination interview for his decision to discharge Busch.

Evidence of disparate treatment also furnishes support for the inference that Busch's discharge was unlawfully motivated. Thus, it is undisputed that Respondent maintains a system of progressive discipline which was not followed in Busch's case. If Respondent believes that an employee, including an employee classified as a foreman, has engaged in or is engaging in objectionable conduct, Respondent requires its superintendent to issue a series of written warning notices to the employee before discharging him for the objectionable conduct. Not one written warning notice was issued to Busch and no explanation was given by Superintendents Walters and McReaken, who testified for Respondent, why they failed to issue Busch a written warning notice, as required by Respondent's system of progressive discipline, if they objected to his tardiness and/or his failure to follow instructions. During the same period in which Busch's discharge occurred, another employee classified as a foreman, Mark McCarter, was discharged by Respondent for his excessive tardiness, but only after Superintendents Walters and McReaken had issued him several written ''Employee Warning Notice(fiMDBUfl*ERR17*fiMDNMfls)fiMDBUfl*ERR17*fiMDNMfl'' over nation was offered by Respondent for the different treatment accorded Busch.

Lastly, the inference of unlawful motivation for Busch's discharge is also supported by the implausibility and the pretextual nature of Respondent's proffered reason for the discharge. *Wright Line*, supra, 251 NLRB at 1088 fn. 12; *Postal Service*, 275 NLRB 510 (fiMDBUfl*ERR17*fiMDNMfl1985)fiMDBU *NLRB*, 881 F.2d 542, 545–546 (fiMDBUfl*ERR17*fiMDNMfl8th Cir. 1980) *Haines, Inc.*, 306 NLRB 634 (fiMDBUfl*ERR17*fiMDNMfl1992)fiMDBUfl*E son who decided to discharge Busch, testified, as set forth in detail supra, that Busch was a talented and an excellent worker, but that St. Lawrence decided to discharge him for two reasons: ''chronic tardiness''; and the ''inability to follow instructions,'' namely, Busch failed to follow the production technique instructions St. Lawrence gave him on July 3, 1991. I am of the opinion, for the reasons below, that the record as a whole establishes that these reasons are completely without substance and pretextual.

On July 3, at the start of the workday, as I have found supra, St. Lawrence visited the 120 Montgomery Street job and instructed Busch to change the production technique being used on the job. As I have also found supra, prior to July 10, Busch and the other employees on the job worked July 3, 5, and 8, and on each of those days performed their work in a manner consistent with St. Lawrence's July 3 instructions. This finding was based on Busch's undenied and uncontroverted testimony. Respondent presented no evidence that Busch failed to obey St. Lawrence's July 3 instructions. Nor did Respondent present evidence from which I could draw the inference that Respondent had reason to believe that Busch had disobeyed St. Lawrence's July 3 instructions. Neither McReaken nor St. Lawrence testified they observed Busch disobey those instructions or that they inspected the job and from their inspection reached the conclusion Busch had disobeyed St. Lawrence's instructions. Their sole testimony on this issue was that on July 10 McReaken verbally informed St. Lawrence that besides coming to work late that day, Busch had also failed to follow St. Lawrence's July 3 production technique instructions. McReaken did not testify how he concluded Busch failed to follow St. Lawrence's July 3 production technique instructions. This significant omission in his testimony is not surprising because the record reveals that, under the existing circumstances, it would have been physically impossible for McReaken on July 10, prior to communicating with St. Lawrence, to have inspected the 120 Montgomery Street job, so as to have determined whether or not Busch had complied with St. Lawrence's July 3 production technique instructions. It is for all of the above reasons, and because of St. Lawrence's and McReaken's poor testimonial demeanor when they testified about the events surrounding the decision to discharge Busch, that I find Busch did not disobey St. Lawrence's July 3 production techni

to-subtle threat of demotion or discipline and discharge, if Busch did not stop complaining about Respondent's failure to provide him with a van for transportation. Having found that Busch's right to make such a complaint to the Respondent was protected concerted activity within the meaning of Sec. 7 of the Act, I further find McReaken's implied threat to Busch that he would be demoted or disciplined and discharged, if he continued to express this complaint, violated Sec. 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl of the Act.

instructions and that when St. Lawrence decided to discharge Busch he had no reason to believe Busch had not followed those instructions.

During his approximately 9 months of employment on the 120 Montgomery Street job, Busch was late for work on an average of once a week. It was not until late May or early June 1991, after he had been on that job for approximately 7 months, that anyone from Respondent spoke to him about his tardiness and it was not until July 3, 1991, that anyone from Respondent spoke to him critically about his tardiness. In late May or early June 1991, as found supra, Superintendent McReaken implicitly warned Busch that if he did not stop complaining about Respondent's failure to provide him with a company van for transportation, Respondent would either demote him from his foreman position or write him up and fire him for his tardiness.[21] Busch replied by indicating he did not intend to stop complaining about Respondent's failure to provide him with transportation. Subsequently, on July 3, for the first time, Superintendent McReaken and Manager St. Lawrence criticized Busch for being tardy; they verbally reprimanded him for coming to work late that day and instructed him to come to work prior to 7 a.m., so he would be ready to start work at the 7 a.m. starting time. It is undisputed that the following week Busch arrived late for work on July 10 and that McReaken, who observed this, suspended him from work ostensibly for his tardiness, and St. Lawrence then decided Busch should be discharged, rather than just suspended. St. Lawrence testified, as described in detail supra, that he decided to discharge Busch on account of his ''chronic tardiness.''[22]

St. Lawrence's decision to discharge Busch for ''chronic tardiness'' refers to more than his just being late for work on July 3 and July 10, 1991, inasmuch as St. Lawrence's use of the term ''chronic'' refers to tardiness which had gone on for a long period of time. In this respect, St. Lawrence testified that Superintendents Walters and McReaken were constantly telling St. Lawrence about Busch's tardiness (fiMDBUfl*ERR17*fiMDNMfl230)fiMDBUfl*ERR17*fiMDNMfl. More specifically, St. Lawrence testified he first learned there was a problem with Busch's tardiness in either November or December 1990, when Superintendent Walters told him there were complaints Busch was not coming to work on time. St. Lawrence testified he instructed Walters to correct the problem. Subsequently, according to St. Lawrence, Walters told him he was still having ''a little bit of a chronic tardiness problem'' with Busch. St. Lawrence testified he once again instructed Walters to remedy the problem. When in May 1991, McReaken replaced Walters as superintendent, St. Lawrence testified McReaken told him Busch was coming to work late by as many as 10 minutes. St. Lawrence testified he informed McReaken that Walters had told him Busch had a problem with tardiness, and further testified he instructed McReaken to remedy the problem. Then, at the end of June 1991, according to St. Lawrence, McReaken told him that the problem with Busch's tardiness still persisted. St. Lawrence testified he instructed McReaken to start monitoring the situation personally. St. Lawrence's aforesaid testimony set forth in this paragraph concerning the complaints made to him about Busch's tardiness by Superintendents Walters and McReaken is not credible because of the reasons below.

St. Lawrence's demeanor when he gave this testimony—his tone of voice and the way he looked and acted while he was on the witness stand—was poor.

Walters, a witness for the Respondent, contradicted St. Lawrence's testimony that Walters, when he was superintendent, complained to St. Lawrence about Busch's tardiness. Walters testified he did not tell any of his superiors about Busch's tardiness.[23]

St. Lawrence's testimony, when considered in the context of the whole record, is inherently incredible. It does not ring true that Superintendents Walters and McReaken complained to St. Lawrence about Busch's tardiness, as described above by St. Lawrence, when, as I have found supra, Walters never even spoke to Busch about his tardiness and, as I have also found supra, it was not until July 3 that McReaken spoke to Busch critically about being late for work. It is not believable that Walters and McReaken would have complained to St. Lawrence about Busch's tardiness, as St. Lawrence testified, if they did not view his tardiness serious enough to speak to Busch personally about the matter. It is also significant that the record reveals that if either Superintendent Walters or McReaken or Manager St. Lawrence had in fact considered Busch's tardiness to be objectionable, that under Respondent's established system of progressive discipline, Superintendents Walters and McReaken would have ordinarily issued a written warning notice to Busch informing him of this. Yet, no written warning notice was ever issued to Busch and no credible explanation for this omission was given by either Walters, or McReaken or St. Lawrence.

It is for the foregoing reasons that I reject St. Lawrence's testimony that Superintendents Walters and McReaken complained to him about Busch's tardiness prior to July 1991. Rather, I find Respondent's supervision and management condoned Busch's chronic tardiness from October 1990 until July 1991.

I am also of the opinion that the record establishes Respondent stopped condoning Busch's ''chronic tardiness'' in July 1991 and used it as an excuse to discharge him for refusing to obey Respondent's command that he stop engaging in what I have found to be his protected concerted activity herein; his insistence that Respondent provide him with a company van for transportation to and from work, with ''drive time'' pay, or, in the alternative, with ''travel pay.'' Thus, by late May or early June 1991 Busch had made it clear to Respondent that he did not intend to comply with

[21] McReaken, during this period of time, also told Respondent's Project Manager Barnes that if Busch did not stop complaining about his ''travel pay,'' Respondent intended to discharge him for his tardiness.

[22] St. Lawrence testified if Busch had not been late for work on July 10 he ''probably'' would not have decided to discharge him for his failure to obey St. Lawrence's July 3 production technique instructions, but would have merely talked to him about his failure to obey those instructions.

[23] I considered McReaken's testimony that after replacing Walters as superintendent, he informed St. Lawrence that he had ''heard in the field'' that the 120 Montgomery Street job was starting late. McReaken testified he was unable to remember St. Lawrence's response. I reject his testimony because his testimonial demeanor was poor and I find it incredible that McReaken viewed Busch's tardiness as serious enough to mention to St. Lawrence, yet not serious enough to issue Busch a written warning notice as required by Respondent's established disciplinary procedure, or, as I have found supra, to even verbally warn Busch about his tardiness.

the requests of Respondent's manager, St. Lawrence, and its general superintendent, Conley, that he cease engaging in the aforesaid concerted activity. Instead, Busch made it clear to them that he thought he was entitled to those employment benefits under the terms of the Union contract and intended to continue to press for them. Respondent's answer to Busch's refusal to obey its command to cease engaging in his concerted activity was to have Superintendent McReaken implicitly threaten Busch that if he did not stop engaging in this activity, Respondent would either demote him or write him up and discharge him for his tardiness. Also, McReaken informed Respondent's project manager, Barnes, that if Busch did not stop engaging in his concerted activity that Respondent intended to discharge him for his tardiness. Busch's response to McReaken's aforesaid threats was to indicate he did not intend to obey Respondent's command that he cease engaging in his concerted activity. It was shortly thereafter that Busch for the first time was criticized by Respondent for his tardiness and then discharged for what Respondent now claims was his ''chronic tardiness.'' These circumstances, when viewed in the context of Respondent's prior condonation of Busch's ''chronic tardiness,'' overwhelmingly establish that Busch's ''chronic tardiness'' was not the real reason for Respondent's decision to discharge him, but was seized upon by Respondent as an excuse to justify his discharge.

Considering Respondent's extreme hostility toward Busch and its threat to demote or discipline and discharge him for insisting that Respondent provide him with a company van for transportation and with ''drive time'' pay or, in the alternative, with ''travel pay''—activity which was protected concerted activity; considering that during Busch's termination interview Respondent indicated that a motivating factor in its decision to discharge him was his protected concerted activity; considering that in discharging Busch, Respondent deviated from its usual system of progressive discipline; considering that Busch was the victim of disparate treatment; and considering that the reasons advanced by Respondent for Busch's discharge are either without substance or pretextual; I find the General Counsel has established that a motivating factor in Respondent's decision to discharge Busch was his protected concerted activity. The General Counsel therefore has presented a prima facie case that Busch was discharged because of his protected concerted activity. Under *Wright Line*, Respondent must show that it would have discharged him anyway, absent his protected concerted activity. Since I have found, supra, that the proffered reasons for the discharge were either without substance or pretextual, I conclude that Respondent has not met its *Wright Line* burden. Therefore, I find that the Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl of the Act by discharging Busch on July 12, 1991, because of his protected concerted activity. For the same reasons, I also find Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl 10, 1991, it suspended Busch. I considered that Busch's July 10 suspension, which was changed to a discharge 2 days later, was not alleged to have violated the Act. However, the issue of Respondent's motivation in suspending Busch was closely related to the issue of its motivation in discharging him 2 days later and the issue of Respondent's motivation in suspending him was fully litigated.[24]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl6)fiMDBUfl*ERR

2. The Union is a labor organization within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl of th

3. The Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDE its July 10, 1991 discriminatory suspension and its July 12, 1991 discriminatory discharge of Taras Busch because he engaged in the concerted activity for mutual aid and protection of protesting what he reasonably and honestly deemed to be violations of the collective-bargaining agreement between the Union and the Respondent.

4. The Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDE threatening Busch in late May or early June 1991 with demotion, discipline, and discharge if he continued to engage in the concerted activity for mutual aid and protection of protesting what he reasonably and honestly deemed to be violations of the collective-bargaining agreement between the Respondent and the Union.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl6)fiMDBUfl*ERR

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDI shall recommend that it cease and desist and take certain action of effectuate the policies of the Act.

Having found that Respondent violated the Act by suspending and discharging Taras Busch, I shall recommend that Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges. I shall also recommend that Respondent make Busch whole for any loss of earnings and other benefits he may have suffered as a result of his unlawful suspension and discharge, with backpay to be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (fiMDBUfl*ERR17*fiMDNMfl1950)fiMDBUfl*ERR17*fiMDNM manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (fiMDBUfl*ERR17*fiMDNMfl1987)fiMDBUfl*ERR17*fiMDNMf spondent remove from its records any reference to the unlawful suspension and discharge, provide Busch with written notice of the removal, and inform him that the unlawful suspension and discharge will not be used as a basis for future personnel action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

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[24] Since I have found Respondent violated Sec. 8(fiMDBUfl*ERR17*fiMDNMfla)fiMD by suspending and discharging Busch for engaging in protected concerted activity under *City Disposal Systems*, supra, I find it unnecessary to determine whether the discharge also violated Sec. 8(fiMDBUfl*ERR17*fiMDNM the Act since the finding of such an additional violation would not materially affect the recommended Order.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, First Western Building Services, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl Discharging, suspending or otherwise disciplining employees because they exercise their right to engage in concerted activities as guaranteed by Section 7 of the Act.

(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl Threatening to discharge, demote, or to otherwise discipline employees because they exercise their right to engage in concerted activities as guaranteed by Section 7 of the Act.

(fiMDBUfl*ERR17*fiMDNMflc)fiMDBUfl*ERR17*fiMDNMfl In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl Offer Taras Busch immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl Remove from its files any reference to the unlawful suspension and discharge of Taras Busch and notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(fiMDBUfl*ERR17*fiMDNMflc)fiMDBUfl*ERR17*fiMDNMfl Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(fiMDBUfl*ERR17*fiMDNMfld)fiMDBUfl*ERR17*fiMDNMfl Post at its San Leandro, California facility copies of the attached notice marked ''Appendix.''[26] Copies of the notice on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(fiMDBUfl*ERR17*fiMDNMfle)fiMDBUfl*ERR17*fiMDNMfl Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, suspend or otherwise discipline you because you exercise your rights to engage in concerted activities as guaranteed by Section 7 of the Act.

WE WILL NOT threaten you with discharge, demotion, or with discipline for exercising your rights to engage in concerted activities as guaranteed by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Taras Busch immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful suspension and discharge of Taras Busch and notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

FIRST WESTERN BUILDING SERVICES, INC.